

BOARD OF ZONING APPEALS
December 18, 2008

A. Roll Call

Present:

Mr. Wenger
Mr. Rhodes
Ms. Moody
Mr. Watkins
Mr. Fraley

Others Present:

Adam Kinsman, Deputy County Attorney
Leo Rogers, County Attorney
Melissa Brown, Deputy Zoning Administrator
Ellen Cook, Senior Planner
Brian Elmore, Development Management Assistant
Christy Parrish, Proffer Administrator

B. Minutes

Mr. Wenger called the meeting to order at 7:00.

Mr. Fraley moved to approve the minutes of the October 4, 2008 meeting.

Mr. Rhodes seconded the motion for approval.

The October 4, 2008 minutes were approved by voice vote (5-0).

C. Old Business

D. New Business

ZA-0008-2008 Verizon Wireless/Cingular Wireless Kingsmill Tower

Mr. Wenger opened the public comment session.

Mr. George Cook, 129 Green's Way, stated Kingsmill still needed better cellular reception.

Mr. Pat McDermott, 116 Roger Smith, asked the Board to consider the residential character of the neighborhood and the unusual nature of the proposed tower property. He stated allowing camouflaged towers by right should be narrowly construed.

Mr. Alfred McKenney, 516 Fairfax Way, stated Kingsmill's strict homeowner covenants conflicted with the intrusive nature of the towers. He said the original Kingsmill contract between Busch Properties and Colonial Williamsburg stated the development would be low-rise in character.

Mr. Robert Richardson, 2786 Lake Powell Road, asked why residential height restrictions would not apply to commercial properties.

Ms. Nancy Thompson, 109 William Allen, stated she believed the majority of Kingsmill residents did not want the towers.

Mr. Wenger closed the public comment session.

Mr. Wenger swore in the court reporter at the request of the attorneys present.

Mr. Kinsman made a request to strike the supplemental BZA application received by staff the previous week from Kaufman and Canoles on the grounds that the 30 day appeal period had expired for this case.

Mr. Barrow Blackwell, appellant attorney, stated the document only changed interested parties and no issues before the Board.

Mr. Fraley made a motion to grant Mr. Kinsman's request to strike the supplemental application.

Ms. Moody seconded the motion.

By voice vote, the Board of Zoning Appeals unanimously approved the motion (5-0).

Mr. Wenger opened the public hearing.

Mr. Blackwell, appellant attorney, stated his client was appealing Planning Director's decision to allow two 120 foot cell towers in Kingsmill. He stated the towers would affect three neighborhoods and resort visitors. He said James City County code's purpose and intent stringently applies to cell towers within a residential area. He said the towers were significantly higher than surrounding trees and required substantial area for construction and asked the Board if the cell towers met the James City County Code definition of 'camouflaged structures.' He stated the cell towers could not be sufficiently buffered, and were planned to be placed by deciduous trees. Thus, the Planning Director's decision that the mono-pine cell tower design resembled a loblolly pine, a common local tree was incorrect and that visual impact was a legitimate reason for a Board ruling.

Mr. Tim Trant, appellant attorney, suggested that the primary legal requirements for a tower being camouflaged include the following: tower has appearance and scale of other structures in the district, tower has the appearance of vegetation native to Eastern Virginia, or completely surrounded by a 100 ft buffer of existing mature trees. He disputed Mr. Sowers' assertion that the tower was most like a loblolly pine. In his opinion, none of these requirements were met for the tower project. He discussed the lack of suitable tree buffer and the tower company's berming proposals. He showed site lines from various nearby vantage points to the tower locations and described the drawbacks of each vantage point.

Mr. Trant introduced Mr. Oscar Richardson to discuss the arborist perspective of the proposed structure.

Mr. Oscar Richardson, certified arborist, stated that the monopine towers, as proposed, were not consistent with native Virginia plant species. He discussed the differences in buffering provided by independent trees versus trees found in forests. He stated the trees surrounding the proposed tower sites appeared to have reached maturity, with little upward growth, failing to mitigate the cell towers' visibility and that the casual observers would be able to quickly notice the difference between the towers and the buffer. The required 100-ft buffer was not adequate, and that the towers would extend 40 ft taller than the surrounding tree canopies. Finally, he stated it would be cost-prohibitive to transport mature trees and it would take 20-40 years for a 20-30ft tree to reach maturity, depending on rainfall. During that time, the towers would be clearly visible.

Mr. Christopher Mills, TAM Consultants, was speaking to provide geometric analysis of the site. He presented views of the towers from nearby locations, with and without berming and buffering. He said existing and planned buffers would not be adequate to hide the towers. He stated buffers must be at least 32 feet high to begin to reduce visibility of the towers.

Mr. Trant suggested that the ordinances were designed to protect property values, aesthetic quality, and the scenic character of the area. He asked if the Planning Director's decision reflected these goals. He stated there was a nearby archeological site. He quoted the ordinance requirement that the impacts on the community regarding height must be mitigated and that performance standards must all be met, including evidence that alternatives were pursued and evidence of buffer requirements on site.

Mr. Fraley stated that according to Mr. Trant's argument, cell towers could not be placed in any residential zoning district.

Mr. Trant stated there were circumstances where the proposed towers would have been acceptable and meet requirements. The surrounding scale of the buffers could have been ignored if the monopine resembled eastern Virginia vegetation.

Mr. Wenger ordered a five-minute break.

Mr. Rogers requested the Board strike the case. He stated the appellant had not offered substantial proof that the planning director's decision was wrong and that state laws require the Board to have substantial evidence to overturn the Planning Director's decision. He discussed drafting the County's tower ordinances to comply with the Federal Telecommunications Act which required some towers to have legislative approval, and others to have administrative approval. He stated that the planning director is the individual with the authority by code to make this decision.

He stated the appellant's had not provided justification for the expertise of their expert's testimony.

Mr. Fraley asked if any other Virginia localities allow by-right towers in residential areas.

Mr. Rogers stated the tower ordinance had been heavily studied with examples from many other localities.

Mr. Blackwell cited the federal law that still allows standards to apply to tower cases.

No objections regarding credentials were raised during witness testimony.

Mr. Trant stated that Mr. Rogers writing of tower regulations implies the County thought it necessary to impose standards on towers. He asked the Board to overrule the motion to strike.

Mr. Rhodes made a motion that Mr. Roger's request to strike the case be denied.

Mr. Fraley seconded the motion.

In a unanimous voice vote, the motion to deny the strike was approved (5-0).

Mr. Kinsman stated the evening's cases were officially filed with the County more than a year ago. He said the Planning Director, Mr. Sowers, had considered many tower applications under the ordinance. He stated the Board must determine if Mr. Sowers' decision was correct, unless offered proof otherwise. He further stated Mr. Sowers' decision was twice affirmed by the Planning Commission and the Development Review Committee and that the intent of the ordinance could be considered, but not the merits of the ordinance.

Mr. Kinsman called Mr. Sowers to the podium.

Mr. Trant objected to the swearing in of Mr. Sowers since his witnesses were not sworn in.

Mr. Watkins stated the Board should be consistent in not swearing in any witnesses.

Mr. Kinsman objected to the Board's decision not to swear in witnesses.

Mr. Kinsman asked Mr. Sowers how many times he had interpreted the tower ordinance.

Mr. Sowers stated he had reviewed 8-10 camouflaged towers. He said he made his judgement on the Kingsmill towers based on materials from the applicant, citizens' groups, and staff recommendations.

Mr. Sowers discussed various documents relating to the site plan. He said his determination was that the towers were camouflaged and met the ordinance criteria and intent for such structures.

Mr. Blackwell questioned Mr. Sowers.

Mr. Sowers stated he was neither a landscape architect nor an arborist.

Mr. Kinsman objected to the credentials of the appellant's arborist.

Mr. Wenger sustained the objection.

Mr. Sowers stated he based his decision that the towers were akin to loblolly pines based on examples of loblolly trees in the local area. He stated a number of on-site observations helped determine if buffering would be adequate. He said his report did not reference the aesthetic character of Kingsmill or minimizing structures that depart from existing development.

Mr. Sowers discussed his experience with loblolly pines. He stated he considered planted heights of buffer trees, and probable growth times. He discussed instruments used to determine tree height. He said using visual side angle testing, he determined that 25ft high berming was sufficient. He said performance standards were an adopted policy of the Board of Supervisors and he believed performance standards in this situation did not require a 100-foot buffer, that other means than trees could create that buffer.

Mr. Blackwell asked Mr. Sowers to identify the number of buffer evergreens that would need to be planted based on a GIS photo.

Mr. Kinsman objected to the GIS image, as it lacked detail.

Mr. Wenger sustained Mr. Kinsman's objection.

Mr. Sowers stated two monopine towers were previously approved in the County, and that he turned down two or three more. The denials were based on the structures' scale and sight line disadvantages.

Mr. Rhodes stated the Code requires balloon tests at multiple heights to determine impact on coverage.

Mr. Sowers stated he had only balloon tested at 120ft. He said it was to his discretion to determine which features counted as equivalent to buffer and that the 120ft tower height allowed for two providers to locate on each tower which was advantageous from a site perspective.

Mr. Kinsman called Ms. Cook to the podium.

Ms. Cook identified several case documents and photographs for Mr. Kinsman.

Mr. Blackwell objected to various applicant documents being accepted as County case exhibits.

Mr. Wenger sustained Mr. Blackwell's objection.

Mr. Trant questioned Ms. Cook.

Mr. Watkins asked if any simulated photographs from the Moody's Run neighborhood had been received by staff.

Mr. Fraley stated he had viewed multiple photographs and simulations from several sources representing several angles. He said the Development Review Committee had asked staff to determine which of these pictures were accurate.

Ms. Cook stated staff used a variety of methods, including photos, balloon tests, and site visits to determine the accuracy of the photos.

Mr. Fraley stated he believed a photo used in staff's approval was out of proportion, location, and perspective.

Mr. Rhodes asked how the County ensured structures were built according to the documents submitted to staff.

Ms. Cook stated any structures must match the approved site plan documents. She said these documents are enforced by site inspection at CO. She said staff evaluates simulated documents through a variety of methods.

Ms. Moody asked if a plan for the Moody's Run view had been submitted.

Ms. Cook stated Planning reviewed a simulation video, as well as several citizen-submitted simulations.

Mr. Fraley stated the cell tower company planned to add additional buffering to Moody's Run and adjust the monopine tower based on conversations with the Kingsmill citizen's group. He said the additional modifications were supported by the DRC.

Mr. Kinsman stated the DRC should defer to the Planning Director's decisions. He said the DRC is created by County Code, and appeals of the Planning Director's decisions should go the DRC. He said the DRC's scope was to determine if the Planning Director's decision was correct or not.

Mr. Kinsman called Mr. David Neiman, the appellant, to the podium and asked questions of Mr. Neiman related to the application for appeal. Specifically, he inquired as to the group under which he made application, Kingsmill Tower Advocacy Group. He questioned whether Mr. Neiman could legally file appeal in the case.

Mr. Blackwell gave his closing argument. He stated the federal telecommunications act does not prevent counties from regulating towers. He outlined the fact that the Board's decision was whether or not Mr. Sowers correctly judged the monopine tower as resembling a loblolly pine and if an appropriate buffer was present. He said the wireless towers cannot be successfully camouflaged. He asked if all alternatives to the cell tower were explored. He stated that the towers did not fit the overall Kingsmill aesthetic.

Mr. Kinsman gave his closing argument. He said great weight and deference should be given to the Planning Director's decision and that he did not believe Mr. Sower's decision was incorrect. He went on to state that federal communications standards require substantial evidence for a tower approval to be overturned by a Board. He said the Board is the third appellate body to review the case; the DRC reaffirmed the decision twice. All three bodies determined the towers were camouflaged. He said Mr. Sower's decision took months of consideration to reach and, in his opinion, was correct.

Mr. Wenger closed the public hearing.

Mr. Rhodes stated he did not like the County's tower ordinance allowing towers by-right in neighborhoods. He went on to say that the ordinance is clear in this situation, and that the Planning Director was acting under correct authority. He stated that the Planning Director's decision was consistent with previous decisions and that the Board should uphold Mr. Sowers' decision.

Ms. Moody stated that the monopine tower did not meet any of the three qualifications for a camouflaged structure. While she agreed with the Code's intent, she felt it was too close and too much for nearby neighborhoods.

Mr. Watkins stated the Virginia Code says zoning ordinances should facilitate a "convenient, attractive, and harmonious community..." He stated the County tower ordinance includes performance standards to maintain the County's character and minimize tower impacts and that the Planning Director made an incorrect decision according to the Zoning Ordinance.

Mr. Wenger stated the County tower ordinance has its flaws, but believes the Planning Director's decision should be upheld. He said the ordinances are strict on the Board's authority in this matter.

Mr. Fraley stated, as a member of the DRC, the Committee affirmed the Planning Director's decision without regard to the intent of the ordinance. He said his DRC decision was narrow in scope due to advice given by staff. He believed the Kingsmill tower proposal was unlike other monopine towers in the County, and that alternatives were available. He stated that the ordinance requires cell tower sites and their impacts to be minimized, giving this review a greater scope than the DRC review. Thus, he believes the Planning Director's decision fails the statement of intent per the ordinance.

Mr. Fraley made a motion to overturn the decision of the Planning Director.

Ms. Moody seconded the motion.

In a roll call vote, the motion to overturn the Planning Director's Decision was approved 3-2 with Ms. Moody, Mr. Fraley and Mr. Watkins motioning for approval and Mr. Rhodes and Mr. Wenger dissenting.

E. Matters of Special Privilege

F. Adjournment

Mr. Fraley motioned to adjourn, with a second from Mr. Rhodes.

Mr. Wenger adjourned the meeting at 12:30am.

Mark Wenger
Chairman

Melissa C. Brown
Secretary